BEFORE THE

Federal Communications Commission

In the Matter of	)	
	)	
Reexamination of the Policy	)	GC Docket No. 92-52
Statement on Comparative	)	
Broadcast Hearings	)	RM-7739
	)	RM-7740
	)	RM-7741

To: The Commission

REPLY COMMENTS OF FREDERICKSBURG CHANNEL 2

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SUMMARY

The five factors identified in the D.C. Circuit's Retail, Wholesale decision uniformly indicate that new comparative standards adopted in this proceeding may not be applied retroactively to long-pending comparative proceedings in which no challenge to the integration criterion was ever made. The issue of retroactivity is an issue of law, not one of policy, and the Commission must resolve it by declining to apply new standards retroactively to such long-pending proceedings. Any other course would invite yet another reversal in the Court of Appeals. Such a course will also further substantial public interest ends, including expediting new broadcast service to the public and reducing the resources which the Commission would otherwise be required to devote to processing long-pending comparative proceedings under new standards. Given the inordinate delay which has already affected many comparative proceedings, the Commission should do everything possible to expedite the processing of all pending proceedings, consistent with applicable law.

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Fredericksburg Channel 2 ("FC2"), by counsel, submits these reply comments in response to the Commission's Second Further Notice of Proposed Rulemaking, FCC 94-167 (released June 22, 1994) ("Second Further Notice").[1/]

I. Retroactive Application of New Standards

Approximately fifty initial Comments have been filed in response to the Second Further Notice. A significant number have urged that it would be unlawful for the Commission retroactively to apply new standards announced in this proceeding to long-pending comparative cases in which the integration criterion has never been

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1/ FC2 is an applicant in MM Docket No. 87-250, a comparative proceeding involving a construction permit for a new VHF television station to serve Fredericksburg, Texas. FC2's interest in this proceeding is further described in its initial Comments submitted in this Docket on July 22, 1994.

challenged.[2/] Out of fifty comments, not one has provided any legal justification for the proposition that retroactive application of new standards to long-pending cases would be permissible.[3/]

[2/] In addition to FC2's initial Comments, see, e.g., Lowrey Communications Limited Partnership Comments at 2-8; Stephen M. Cilurzo Comments at 2; United Broadcast Group Limited Comments at 1; John A. Carollo, Jr., et al., Comments at 3-5. Many additional comments have urged the Commission to reaffirm the continuing validity of the current comparative criteria, including integration, and have thus implicitly opposed the retroactive application of new standards. See, e.g., Black Citizens for a Fair Media Comments; LULAC Comments at 4; Galaxy Communications, Inc. Comments at 1-2; Breeze Broadcasting Co. Ltd. Comments at 3-6; Lisa M. Harris Comments at 3-6; Eleanor Lewis Stephens Comments at 3-4; Barbara D. Marmet Comments at 3-7; Perry Broadcasting, Inc. Comments at 3-4. Other commentors have supported the continued use of the existing enhancement factors in ways essentially unchanged from current law. E.g., ROJO, Inc. Comments at 2-3; Heidelberg-Stone Comments at 2-3; SBH Properties, Inc. Comments at 2-3; Rio Grande Broadcasting Co. Comments at 2-3; Caldwell Broadcast Limited Partnership Comments at 1-6.

[3/] Only two commentors appear to claim that the Commission may properly apply new standards to long-pending cases in which the old standards were never challenged, and both merely assert this view without any supporting analysis or citation to case authority. See Bechtel & Cole, Chartered Comments at 6 (retroactive application "probably lawful" and "fair game"); J. McCarthy Miller Comments at 5 ("no unfairness" in applying new standards retroactively). Although the Bechtel & Cole comments provide (at 6-10) a legal analysis of why application of new standards to the Bechtel proceeding itself is permissible (a proposition which is plainly correct as a legal matter), no such analysis is supplied with respect to the very different legal issue of retroactive application of new standards in other comparative proceedings in which no challenge to the integration criterion was ever made. This distinction is critical, for new rules devised in adjudication are virtually always applied in the case in which they are announced; but the same is not true for other cases. See generally Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380, 390-91 (D.C. Cir. 1972); Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074, 1081-82 & n.6 (D.C. Cir. 1987) (en banc).

The comments also express general agreement that the standards of SEC v. Chenery Corp.[4], as eleborated by the D.C. Circuit in Retail, Wholesale and Department Store Union v. NLRB, 466 F.2d 380 (D.C. Cir. 1972) ("Retail, Wholesale"), and Clark-Cowlitz Joint Operating Agency v. FERC, 826 F.2d 1074 (D.C. Cir. 1987) (en banc) ("Clark-Cowlitz"), govern the issue of retroactivity to be decided here.[5] As no commentor has disputed, the five factors identified in Retail, Wholesale clearly dictate that any new standards adopted in response to the Bechtel decision cannot legally be applied retroactively to long-pending Commission proceedings in which no challenge to the integration criterion was ever raised.

The first Retail, Wholesale factor -- "whether the particular case is one of first impression" -- recognizes that the legitimate interests which favor applying a new rule in the case in which it is first announced (here, the Bechtel case itself) do not apply to

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[4] 332 U.S. 194 (1947).

[5] See, e.g., FC2's Comments at 4-6; Bechtel & Cole Comments at 6-10; Lowrey Communications, Limited Partnership Comments at 5-8. Lowrey Communications also argues that retroactive application of any rules promulgated in this rulemaking proceeding would be inconsistent with Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988), because Congress has not delegated to the FCC the statutory authority to promulgate retroactive rules. Id. at 3-4. This view may have merit, but because the Bechtel decision itself was rendered in an adjudication, the issue of what retroactive effect that decision may have on other pending agency adjudications is probably best analyzed under the Retail, Wholesale standards, which govern "retroactive application of rules announced in agency adjudications." See Clark-Cowlitz, 826 F.2d at 1081.

other pending cases (which the Court termed cases of "second impression") in which the old rule was not challenged, the issue of its validity was not litigated, and thus the degree of reliance on the old rule is inevitably greater. See Retail Wholesale, 466 F.2d at 390-91; Clark-Cowlitz, 826 F.2d at 1081-82 & n.6.[6/] This factor would thus favor application of the new rule in the Bechtel proceeding itself, but would disfavor retroactive application in other pending cases in which no challenge to the integration criterion has been raised.

[6/] The policies underlying the "first impression" factor, as identified by the D.C. Circuit, include preserving the incentive for parties to challenge outdated rules and the "case or controversy" problems involved in rendering adjudicative rulings that are to apply only prospectively (and hence not to the parties in the particular case in which the rule is announced). Moreover, as Bechtel & Cole note in their comments (at 9), parties in the case where the rule is challenged "were aware of that effort and had full opportunity to oppose it." The same is not true of parties in other cases.

It maybe noted that, in Clark-Cowlitz, members of the Court expressed disagreement over the correct interpretation of the Retail, Wholesale "case of first impression" factor. The majority read the factor to disfavor retroactive application in cases other than the case in which the new rule is actually announced; while the dissent read the factor to disfavor retroactive application in cases where the new rule changes a prior rule, rather than creating a new rule where no rule had existed before (i.e., in a "case of first impression" in the common legal sense). Compare 826 F.2d at 1082 n.6 with id. at 1094-95 (Mikva, Robinson & Edwards, JJ., dissenting). This distinction does not matter here, because neither interpretation would favor retroactive application of new comparative broadcast standards to long-pending cases in which the integration preference was never challenged. Under the majority's view, retroactivity would be disfavored in cases other than the Bechtel case itself; and under the minority's view retroactivity would be disfavored in all cases, because the Bechtel Court did not make law where none had existed before, but rather simply rejected a long-existing Commission policy.

The second factor -- "whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law" -- disfavors retroactive application of a new rule where reasonable reliance on the old rule is likely to be high and favors retroactive application where potential reliance on the old rule is likely to be less pronounced. This factor also weighs heavily against any retroactive application of new standards in long-pending proceedings where the integration criterion was never challenged. The integration criterion was clearly "well established" -- it had been uniformly followed by the Commission for nearly thirty years. The Bechtel decision was nothing if not an "abrupt departure from well established practice."[7/]

The third factor -- "the extent to which the party against whom the new rule is applied relied on the form of rule" -- focuses on matters such as the nature of actions taken in reliance upon the prior rule and the length of time during which the prior

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[7/] Commentor Bechtel & Cole claims that reliance on the integration policy may be less than fully justified because of alleged "vagaries" of the policy. Bechtel & Cole Comments at 10. For nearly thirty years, the integration policy remained essentially unchallenged and unchanged (except for minor adjustments involving matters such as what constitutes a "clear" quantitative difference, or what particular types of employment positions will garner credit, etc.). So far as FC2 is aware, no case in that entire thirty year history ever cast serious doubt on the criterion's validity. Indeed, the integration "policy" was applied with such complete uniformity and consistency that, one might well argue, it was policy in name only, and was in reality a rule in its application. Cf. United States Telephone Ass'n v. FCC, No. 92-1321 (D.C. Cir.; July 12, 1994).

rule was in effect. See Retail, Wholesale, 466 F.2d at 391 (denying retroactive application of new rule where former rule had been in effect for seven years); Clark-Cowlitz, 826 F.2d at 1083-84 (allowing retroactive application where former rule was in effect only a short time and no actions had been taken in reliance on it). Because the Commission's integration criterion has been in force for nearly thirty years, the extent of reliance on the criterion by pending applicants is obviously substantial. The entire legal structure of most pending applicants has been formulated in light of the criterion, as have many other aspects of the comparative proposals made in pending cases. Many years of time, effort and massive litigation expense have been devoted to prosecuting applications that are squarely premised on the Commission's integration criterion. The extent of reliance here is thus substantially greater than that which was present in Retail, Wholesale and which led the Court to reject retroactive application of the new rule at issue in that case.

The fourth factor -- "the degree of the burden which a retroactive order imposes on a party" -- also clearly disfavors retroactive application of new standards. Retroactive application would turn winning applicants into losing applicants. It would wipe out hundreds of thousands (and, on a collective basis, millions) of dollars in litigation expenditures, as well as many years of time and effort. Not only would such substantial past investments be utterly lost, but tens or hundreds of thousands of

additional dollars, and years of further time and effort, could be required to demonstrate a different set of qualifications under some newly adopted comparative criteria.[8/] The burden which retroactive application would create is thus enormous.

The final factor -- "the statutory interest in applying a new rule despite the reliance of a party on the old standard" -- also does not support retroactive application of new comparative standards to long-pending cases. Although the Bechtel Court found the integration preference to be arbitrary, it also frankly acknowledged the difficulties involved in establishing any type of "rational" comparative criteria and noted that those difficulties "flow from the statutory scheme itself." 10 F.3d at 886-87. Thus, by the Court's own assessment, the margin of difference in "arbitrariness" between the integration criterion and some different standard that the Court might uphold is not a large one.

In cases in which no applicant has ever challenged the integration criterion, it certainly cannot offend the legitimate

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[8/] As one commentor noted, the prospect of conducting entirely new hearing proceedings "would impose an unreasonable, and for some applicants, an insupportable financial burden." Lowrey Communications, Limited Partnership Comments at 7. It is hard enough for most broadcast applicants to support the costs of one comparative hearing before the Commission. To require applicants in long-pending cases to "start all over again" and go through yet another hearing would turn pending proceedings into a mere war of attrition in which only the rich survive. As the record in the Fredericksburg case reflects, FC2's principals are individuals of substantial wealth. FC2 could thus afford another hearing. But many less fortunate applicants could not. For those applicants in particular, the Commission should reject out of hand the idea of conducting further hearings in long-pending comparative cases.

interests of any party to continue to apply the integration criterion. Nor will it disserve the interests of the public to continue to apply the integration criterion. Indeed, such action will eliminate much needless delay and expense in processing pending cases, and will greatly expedite the provision of new broadcast service to the public. Expediting new broadcast service to the public is a palpable public interest benefit which obviously and directly furthers the statutory interests of the Communications Act. The nebulous possibility of some indeterminate harm resulting from application of a supposedly "arbitrary" integration criterion in cases which have been squarely based on that unchallenged criterion for many years is -- clearly -- a less weighty statutory consideration.

All five Retail, Wholesale factors thus point to the conclusion that retroactive application of new standards is not permissible here. This is because, put simply, such retroactive application would not be fair. In retroactivity analysis, as in much else, the ultimate issue is one of fairness. See Retail, Wholesale, 466 F.2d at 392; Clark-Cowlitz, 826 F.2d at 1082 & 1086 n.12. As another commentor in this proceeding stated,

> How can the Commission be fair to pending cases before it presently when applying new criteria? This is a difficult question . . . . [Y]ou must consider what these applicants have already been through and how much money has already been spent. Here you have applicants in some cases who have 5 to 10 years and hundreds of thousands of dollars invested in the application and comparative hearing process . . . only to be awarded a Initial Decision and maybe even Review Board decision in their favor . . . then comes the Bechtel decision and to

> face the possibility of maybe 2 or 3 years going back into comparative hearing all over again! This just doesn't seem fair. To have the rules of the game changed after you're out of the ball park, on your way home . . . only to be told you haven't won the game . . . and must come back and play all over again. The Commission should Grandfather such cases.

Comments of Stephen M. Cilurzo at 2. Mr. Cilurzo is right. Even fans of the losing team would think it wrong to deprive the winner of victory based on rule changes not made until the game was all but done. Basic principles of fair play rebel at the thought. Therefore, the law does too.

The issue here is not one of policy or one committed to the Commission's discretion. The retroactivity question is purely an issue of law, and its resolution will be scrutinized accordingly on review. See Retail, Wholesale, 466 F.2d at 390; Clark-Cowlitz, 826 F.2d at 1094 (dissenting opinion); see also, e.g., Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551, 1554 (D.C. Cir. 1987). As a matter of law, therefore, the Commission must decline to apply new standards retroactively to long-pending cases in which the old standard was not challenged.[9/]

[9/] Nothing in the Bechtel decision is to the contrary. The Court's injunction to the Commission to consider applications "properly before it" under "standards free of the integration preference," 10 F.3d at 878, referred only to applicants in the Bechtel proceeding itself. See id. at 887. The Court obviously did not pass on any issue of retroactivity or purport to change the governing D.C. Circuit law on such issues.

As a number of commentors have observed, Multi-State Communications, Inc. v. FCC, 728 F.2d 1519 D.C. Cir. 1984), has no bearing on the retroactivity issue here. That case involved an amendment to the Communications Act that expressly overrode

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There may, of course, be reasonable dispute as to how far in the Commission's adjudicative processes a given proceeding must have progressed, prior to Bechtel, to prohibit retroactive application of new standards in the particular case. There can be no question, however, that, at least as to proceedings which have gone beyond the exceptions to initial decision stage without a challenge to the integration criterion having been raised, retroactive application of new standards would be improper. The date for filing exceptions to an initial decision is the last date on which a timely challenge to the integration criterion could be made under Commission rules.[10/] Where no such challenge has been raised in timely fashion, pending proceedings must be decided based on the rules and policies which the Commission has followed for the past thirty years.[11/]

[9/] (...continued)
"any other provision of law." Id. at 1521; see 47 U.S.C. 331(a). The only constraint on such a statutory command is a Constitutional one; and the only issue is the validity of the statute. The constitutionality of the Bechtel decision is not at issue here; the issue here is the retroactive application of that decision.

[10/] See 47 C.F.R. § 1.277(a).

[11/] A number of parties have commented on when or whether applicants should be allowed to amend their applications to conform to new standards. This question is, of course, directly related to the issue of retroactive application of new standards. In cases where retroactive application is prohibited, no need for amendment exists and no opportunity for amendment should be afforded. In pending cases where new standards may properly be applied, an opportunity to amend to meet such standards should be afforded to the extent dictated by the same considerations of
(continued...)

II. Expedited Treatment

A large number of commentors have urged the Commission to process pending comparative proceedings on an expedited basis. FC2 adds its voice to theirs. FC2 has been in comparative hearing litigation before the Commission for seven years. Others who have commented have been in litigation before the Commission for as long as ten, twelve or more years. This is much too long. Everything possible should be done to expedite the resolution of pending cases, consistent with law and due process. Some constructive "reinvention of government" is needed here, and now, to move these

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11/ (...continued)
fairness which underlie the retroactivity analysis outlined above.

cases along and to avoid the burden of further delay for applicants who have suffered from too much past delay already.

Respectfully submitted

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Dated: August 22, 1994

CERTIFICATE OF SERVICE

I, Lula Parker, hereby certify that I have this 22nd day of August, 1994, sent by U.S. Postal Service, postage prepaid, or caused to be hand delivered, copies of the foregoing "REPLY COMMENTS OF FREDERICKSBURG CHANNEL 2" to the following:

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